

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

	)	Case No. 07-0201 SC
	)	
JEFF POKORNY, LARRY BLENN, and	)	ORDER DENYING MOTION TO REQUEST
KENNETH BUSIERE, on behalf of	)	RETRACTION OF CLASS ACTION
themselves and those similarly	)	EXCLUSION AND REINSTATEMENT OF
situated,	)	<u>CLASS ACTION PARTICIPANT STATUS</u>
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
QUIXTAR, INC., et al.,	)	
	)	
Defendants.	)	
	)	

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**I. INTRODUCTION**

On May 15, 2013, Mr. Dennis Obado (formerly a class plaintiff in the above-captioned case) filed a motion to be reinstated as a class action settlement objector. ECF No. 277 ("Mot.") The motion is fully briefed, ECF Nos. 280 ("Opp'n"), 282 ("Reply"), and appropriate for decision without oral argument, Civ. L.R. 7-1(b). For the reasons explained below, Mr. Obado's motion is DENIED.

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1 **II. BACKGROUND**

2 The Court draws facts from Mr. Obado's motion and from class  
3 counsel's clarifications.

4 Mr. Obado says that he is a former Quixtar independent  
5 business owner ("IBO") who submitted a claim to be included in this  
6 class action suit prior to the deadline date of August 12, 2012.  
7 Mot. at 2. Class counsel confirms that Mr. Obado filed two such  
8 claims: an online claim for products and cash benefits, and a later  
9 duplicate, paper claim. Opp'n at 1. Mr. Obado later filed an  
10 objection to the settlement on August 11, 2012, on the grounds that  
11 the settlement did not provide for treble damages under the New  
12 Jersey Consumer Fraud Act. Id. On August 17, 2012, Mr. Obado  
13 filed an opt-out notice, stating that he had decided to pursue his  
14 own private civil action against Quixtar, based on the New Jersey  
15 Consumer Fraud Act. Id. Ex. A ("Obado Ltr."). Class counsel  
16 states that Mr. Obado reiterated his decision to opt out in two  
17 later emails, Opp'n at 1, and Mr. Obado does not appear to deny  
18 this, see generally Reply.

19 Later, in November 2012, the Court approved a second-round  
20 settlement notice concerning the distribution of excess cash and  
21 products from the class fund. See ECF No. 246 ("Nov. Order").  
22 Specifically, the November Order approved a plan to allow  
23 additional claims to be filed in this case and to make available  
24 increased payments of cash and product benefits, depending on the  
25 number and sufficiency of new claims. Id. at 7-9.

26 The claims administrator for this case mailed the approved  
27 notice to Mr. Obado on January 11, 2013, using his correct address,  
28 and according to class counsel and the claims administrator, the

1 mail was not returned as undeliverable. Opp'n at 1. Even so, Mr.  
2 Obado says that he does not recall receiving notice of the November  
3 2012 change in settlement terms. See Mot. at 2, 8. Mr. Obado now  
4 claims that he sent his opt-out letter in error, since he only  
5 meant to object to the settlement amount and would not have opted  
6 out of the class had he known (after November 2012) that the  
7 settlement benefits had been altered to make increased benefits  
8 available to some claimants. Id. at 2-3, 8-9. Mr. Obado's  
9 argument is essentially that he objected to and opted out of the  
10 settlement because he thought its benefits were too low, and that  
11 after he learned of the settlement's alteration to account for  
12 excess cash and products, his concerns were alleviated and he  
13 wished to become part of the settlement class again.

14 On these grounds, Mr. Obado asks the Court to reinstate him as  
15 an objector to the settlement. Id. at 9. Class counsel opposes  
16 this motion, arguing that no authority supports reinstating an  
17 opted-out class member on motion, absent settlement language  
18 permitting reinstatement by certain deadlines. Opp'n at 3. As  
19 class counsel rightly notes, neither any order nor the settlement  
20 agreement provides for the retraction of opt-outs, and the deadline  
21 for opting out of the class passed nearly a year ago. Id.

22 Mr. Obado adds an array of new arguments to his reply brief.  
23 Normally the Court would not consider new arguments raised on  
24 reply, but since Mr. Obado is proceeding pro se, and since he loses  
25 this motion, the Court summarizes his reply brief's arguments here  
26 and addresses them below. Mr. Obado claims that: (1) Class counsel  
27 did not provide him with adequate legal advice or effective  
28 assistance regarding opt-outs, retractions, or deadlines; (2) class

counsel did not advise him on statutes of limitations concerning the New Jersey Consumer Fraud Act; (3) class counsel's objection to his motion for reinstatement and refusal to assist him in his motion were both actionable breaches of various duties; and (4) absence of legal support for the reinstatement requests suggests that the Court use its equitable powers to reinstate him as an objector. Reply at 4-12.

### III. DISCUSSION

Class counsel is correct that no case law supports Mr. Obado's request to be reinstated as an objector long after he has opted out of the class and all relevant deadlines have passed. Sometimes, class action settlement agreements include clauses discussing how opt-out requests can be withdrawn -- normally by filing notice with class counsel and defendants' counsel within a time set by the agreement. See, e.g., Turner v. Storm8, LLC, No. 09-cv-05234-CW, 2012 WL 3037275, at \*3 (N.D. Cal. July 30, 201) (settlement approval order that includes a reinstatement clause). The settlement agreement in this case includes no such clause. See ECF No. 162 Ex. 2 ("Am. Settlement Agreement"). Mr. Obado states that the settlement agreement includes no right to retract an opt-out notice, and that had he been notified of a retraction policy, he would have retracted his opt-out. See Mot. at 9. Mr. Obado apparently assumes that all class action settlements must include a right of retraction. As noted above, this is not so.

Mr. Obado argues, apparently in the alternative, that he sent his opt-out letter in error, that he never received notice of the November Order's allowance of additional claims and benefits, and

1 that class counsel was remiss in not informing him of either his  
2 opt-out retraction rights (which never existed) or various other  
3 legal issues. For all these reasons, Mr. Obado claims he should be  
4 reinstated as an objector.

5 First, no evidence on this Motion suggests that Mr. Obado sent  
6 his opt-out letter in error. It was apparently a well considered  
7 response to a settlement that Mr. Obado found insufficient, as a  
8 result of which he decided to pursue his own suit. See Obado  
9 Letter at 2 ("After careful consideration, I have decided to opt  
10 out of the class action settlement, in order to pursue my own  
11 private civil action against Quixtar, based on [the] New Jersey  
12 Consumer Fraud Act."). Moreover, despite Mr. Obado's insistence  
13 that he never received notice under the November Order, class  
14 counsel notes that the claims administrator mailed the requisite  
15 notice to Mr. Obado in January 2013 and received no notice that it  
16 was undeliverable. Compare Reply at 5 with Opp'n at 1-2. Mr.  
17 Obado apparently uses the same address now as he did then. Opp'n  
18 at 1-2. Further, Mr. Obado's insistence that opted-out class  
19 members have a heightened need to receive notices relevant to the  
20 class settlement is not based on law: class counsel and the claims  
21 administrator did everything that was required of them. See Reply  
22 at 5-6.

23 Second, the Court finds that class counsel breached no duties  
24 of any kind in not informing Mr. Obado of a retraction right,  
25 rejecting Mr. Obado's requests for legal advice pertaining to his  
26 separate civil suit, or doing anything else Mr. Obado claims to  
27 have been a derogation of class counsel's duties. Class counsel  
28 acted appropriately in all instances.

1 This leaves the Court to consider whether it should exercise  
2 its equitable powers to reinstate Mr. Obado as an objector. Even  
3 if there were such a power, the Court declines to exercise it.  
4 This case and this settlement agreement have involved years of  
5 complex litigation, detailed fact-finding, and protracted  
6 negotiations. The requirements and deadlines set forth in the  
7 Court's orders and the parties' settlement agreement were similarly  
8 well considered, negotiated, and reviewed. Moreover, all relevant  
9 deadlines -- even those for filing claims -- have passed, and to  
10 open the door again would risk a flood of late-coming claimants,  
11 delaying the claims administrator, the Special Master, class  
12 counsel, and the Court. The Court will not upend the entire class  
13 action litigation process at this point.

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15 **IV. CONCLUSION**

16 As explained above, Mr. Obado's motion is DENIED.

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18 IT IS SO ORDERED.

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20 Dated: July 2, 2013



21 UNITED STATES DISTRICT JUDGE  
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